Petition

Office - Supreme Court
FILED
SEP 28 1981
ALEXANDER L. STEVAS
CLERK

81-627

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

ASHLAND-WARREN, INC.

Petitioner,

v.

STATE OF GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

RAY S. BOLZE
Counsel of Record
ROGER C. SIMMONS
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel:

HARRY DOWNS
ASHLAND-WARREN, INC.
Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Attorneys for Petitioner
ASHLAND-WARREN, INC.

Questions Presented For Review

Whether the due process clause of the Fourteenth Amendment to the United States Constitution permits the indictment and criminal prosecution of a corporation under Section 26-2308(a) of the Georgia Code (Ga. Laws 1968, pp. 1249, 1308) when the only penalty contemplated in this statute is imprisonment unless various state probation statutes are read into Section 26-2308(a) to allow a fine at the court's discretion.

Parties

The petitioner here, Ashland-Warren, Inc. appeared as defendant-appellant before the

Supreme Court of the State of Georgia.[1]

---

[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, as amended, a listing of all parent companies, subsidiaries and affiliates of the petitioner is included as Exhibit A to this petition.

TABLE OF CONTENTS

	Page
Questions Presented.....	i
Parties.....	i
Table of Contents.....	iii
Table of Authorities.....	iv
Opinions Below.....	2
Jurisdiction.....	2
Constitutional Provisions and Statutes Involved.....	3
Statement of the Case.....	3
Reasons for Granting A Writ...	10
Conclusion.....	18
Exhibit A	
Exhibit B	

TABLE OF AUTHORITIES

	Pages
Cases:	
Commonwealth v. Illinois Central Railroad, 1952 Ky. 320, 153 S.W. 459 (Ky. App. 1913)	13
Johnson v. State, 169 Ga. 814, 817 (152 S.E.2d 76) (1929)	17
People v. Duncan, 363 Ill. 495, 2 N.E.2d 705 (1936) . . .	12, 13
Southern Railway Co. v. State, 125 Ga. 287 (54 S.E. 160) (1906)	12
State v. Gossler, 57 N.E.2d 677 (Ohio Appl. 1944)	13
State ex rel. Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 478 (1933), 2 N.E.2d 705 (1936) . .	13
State ex rel. Losey v. Willard, 54 So.2d 183 (Fla. 1951) . . .	12
State of Georgia v. Shepherd Construction Company, Inc., et al., Supreme Court of Georgia Case No. 37387; Cross-Appeal No. 37421; Interlocutory Appeal No. 37422	5, 8
State v. Truax, 130 Wash. 69, 226 P. 259 (1924)	13
Wright v. Georgia, 373 U.S. 284, 293 (1963)	10
United States Constitution:	
Amendment XIV	2

Pages

Federal Statutes:

28 U.S.C. 1257(3) 2

State Statutes:

Ga. Code Ann. § 26-2308(a) (Ga. Laws 1968, pp. 1249, 1308) . . . . . 2, et seq.

Ga. Code Ann. § 27-2502 (Ga. Laws 1974, pp. 352, 354) 2,14,15

Ga. Code Ann. § 27-2529 (Ga. Laws 1957, pp. 447; 1964, p. 496) 2,3,14,16

Other:

10 Fletcher, Cyclopedia porations § 4946 at 633 (1978) 13

Corporation's Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed, 80 A.L.R.3d 1220, 1222 (1977) 12

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

ASHLAND-WARREN, INC.

Petitioner,

v.

STATE OF GEORGIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF GEORGIA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Georgia in this case.

OPINIONS BELOW

The opinions of the Supreme Court of the State of Georgia are reproduced in the appendix hereto and are not yet reported. The opinion of the trial court for the State of Georgia is also reproduced in the appendix hereto and is not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV. Ga. Code Ann. § 26-2308(a) (Ga. Laws 1968, pp. 1249, 1308) Ga. Code Ann. § 27-2502 (Ga. Laws 1974, pp. 352, 354) Ga. Code

Ann. § 27-2529 (Ga. Laws 1957, pp. 447; 1964, p. 496), provides as follows:

> 26-2308 Conspiracy in restraint of free and open competition
>
> (a) Transactions with the State
>
> A person who enters into a contract, combination, or conspirary in restraint of trade or in restraint of free and open competition in any transaction with the State or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than five years. The crime of conspiracy in restraint of free and open competition in transactions with the State shall be complete when the contract, combination, or conspiracy is effected, and an overt act in furtherance thereof has been committed.

STATEMENT OF THE CASE

This is a criminal proceeding brought against Petitioner Ashland-Warren, Inc., a corporation, and

two of its individual officers and employees G. W. Jones and E. L. Ogren (not parties to this appeal) for alleged violations (four counts) of Ga. Code Ann. § 26-2308(a) (Ga. Laws 1968, pp. 1249, 1308), prohibiting "Conspiracy in Restraint of Free and Open Competition in Transactions With the State."

The indictment in question was brought on November 21, 1980. The trial court denied Petitioner Ashland-Warren, Inc.'s plea and motion to quash each based on the contention that a corporation cannot be prosecuted for violation of a statute such as Ga. Code Ann. § 26-2308(a) which only provides corporal punishment (death

or imprisonment) as a penalty. The trial court certified his ruling for interlocutory appeal and the Georgia Court of Appeals granted Ashland-Warren, Inc.'s Application for Immediate Review.

In an order dated March 18, 1981, the Supreme Court of Georgia declared petitioner's case to be a companion case to State of Georgia v. Shepherd Construction Company, Inc., et al., Supreme Court of Georgia Case No. 37387; Cross-Appeal No. 37421; Interlocutory Appeal No. 37422, and requested of the Georgia Court of Appeals that it transfer this case. Shortly after the Georgia Supreme Court's request, the Georgia Court of Appeals

transferred this case to the Georgia Supreme Court.

On July 7, 1981, the Georgia Supreme Court issued its initial judgment and opinion in the consolidated appeal and in that opinion found that a corporation could not be prosecuted under Ga. Code Ann. § 26-2308(a) and reversed the trial court's denial of petitioner's challenge to the instant indictment. On July 23, 1981, on the motion for rehearing filed by the State of Georgia, the Supreme Court of Georgia vacated its initial judgment and opinion and entered a second judgment and opinion. In the July 23, 1981 opinion, the Supreme Court reversed its position and

held that a corporation could be prosecuted under Ga. Code Ann. § 26-2308(a) if this statute was read by a trial court judge in conjunction with the probation statutes of the Georgia criminal code. Therefore, the indictment against petitioner was held to be valid. Petitioner's motion for rehearing on this July 23rd judgment and opinion was denied on July 30, 1981. See Exhibit B. No further motion for rehearing is provided for. On August 25, 1981, a dissent was filed from the July 23, 1981 opinion. The July 23, 1981 judgment is the subject of the instant petition for writ of certiorari.

The companion case State of Georgia v. Shepherd Construction Company referred to above is also on appeal to this Court, with a notice of appeal having been filed in the Supreme Court of Georgia on September 21, 1981.

In the trial court, petitioner challenged the constitutionality of Ga. Code Ann. § 26-2308(a) on the basis of vagueness and overbreadth. This was not ruled on by the trial court and is one of the issues presented by the appeal of the State v. Shepherd Construction Co. companion case referred to above.

As fully discussed by the dissent, the constitutional issue presented in this petition was

squarely raised and addressed by the opinion of the Supreme Court of Georgia rendered on July 23, 1981 in which the Court engaged in a tortuous construction of four unrelated probation statutes in order to create a scheme under which petitioner could be prosecuted and punished. The constitutional deficiency in the Georgia Supreme Court's ruling was highlighted by Justice Smith of the Georgia Supreme Court in his dissenting opinion on August 25, 1981. The Georgia Supreme Court has ruled that Ga. Code Ann. § 26-2308(a) is constitutional and that it may be applied to a corporation. As the dissenting Justice recognized, the Georgia Supreme

Court implicitly rejected any due process considerations in its July 23, 1981 opinion.

REASONS FOR GRANTING THE WRIT

The July 23, 1981 judgment of the Supreme Court of Georgia holding that petitioner may be prosecuted under Ga. Code Ann. § 26-2308(a) flies in the face of the fundamental requirement of due process that a person be given fair notice of the conduct proscribed by a criminal statute and of the persons against whom a criminal statute may be applied. See, Wright v. Georgia, 373 U.S. 284, 293 (1963). As explained below and as pointed out by Justice Smith of the Georgia Supreme Court in his dissenting opinion issued

on August 25, 1981, a corporation would have had no notice and would not have reasonably believed that it would be subject to prosecution under Ga. Code Ann. § 26-2308(a) prior to the July 23, 1981 opinion of the Georgia Supreme Court. Moreover, once a prosecution against a corporation is begun under this statute, a corporation still has no way of knowing if it will be subjected to criminal sanctions or if the initial criminal charges against it were valid until after trial and a finding of guilt when a trial judge must then make a decision as to whether to probate the sentence against the corporation.

It is well settled in Georgia and numerous other jurisdictions that "where the only penalty provided for a criminal offense is a corporal punishment, that is where an offender can be punished only by death or imprisonment, a corporate defendant is not liable to criminal prosecution. This result proceeds from the impossibility of subjecting the artificial person of a corporation to a corporal penalty." Annot., Corporations Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed, 80 A.L.R.3d 1220, 1222 (1977); Southern Railway Co. v. State, 125 Ga. 287 (54 SE 160) (1906); State ex rel. Losey v. Willard, 54 So.2d 183

(Fla. 1951); People v. Duncan, 363 Ill. 495, 2 N.E.2d 705 (1936); State ex rel. Kropf v. Gilbert, 213 Wis. 196, 251 N.W. 478 (1933). 2 N.E.2d 705 (1936); Commonwealth v. Illinois Central RR., 152 Ky. 320, 153 S.W. 459 (Ky. App. 1913); State v. Gossler, 57 N.E.2d 677 (Ohio Appl. 1944); State v. Truax, 130 Wash. 69, 226 P. 259 (1924). Accord, 10 Fletcher, Cyclopedia Corporations, § 4946, at 633 (1978) ("A corporation, therefore, cannot be indicted for a felony, where the only punishment provided is death or imprisonment, since a corporation cannot be subject to either penalty.").

This well-established rule was the basis for the initial

July 7, 1981 ruling by the Supreme Court of Georgia that petitioner could not be prosecuted under Ga. Code Ann. § 26-2308(a). (Opinion of July 27, 1981, Section II(a), pp. 5-7, App. 12-14). The Georgia Supreme Court rejected the State's argument that probation statutes which provide for imposing fines could afford a penalty that could be imposed on a corporation, stating that:

> [C]onstruing Code Ann. § 27-2529 with Code Ann. § 27-2502 the former statute authorizes a fine, not as a lawful sentence for a violation of Code Ann. § 26-2308(a), but as a condition precedent to a stay of execution of the only lawful sentence provided for in Code Ann. § 26-2308(a) - imprisonment. (Emphasis added.)

However, apparently bowing to political pressures and influenced

by public sentiment to prosecute members of the highway paving industry, the Georgia Supreme Court completely reversed itself in its July 23, 1981 opinion and judgment. In this judgment that petitioner urges this Court to review, the Court engaged in a legal fiction holding first that a corporation could be prosecuted under Ga. Code Ann. § 26-2308(a) and sentenced to serve a term for years "(even though such sentence be incapable of enforcement)." Judgment and Opinion of July 23, 1981, pp. 6-8, App. 40). Then, a court may suspend that fictional sentence under the statute providing for setting and probating determinate sentences. Ga. Code Ann. § 27-2502, and impose a fine pursuant to the statute which

provides for the payment of fines as a condition to probation of a felony offense Ga. Code Ann. § 27-2529. By reading these statutes together, the Georgia Supreme Court concluded that the initial deficiency in Ga. Code Ann. § 26-2308(a) in regard to corporate liability is cured.

The constitutional infirmities in this construction and application of Ga. Code Ann. § 26-2308(a) are evident. First, a corporation would have no way of knowing, and there is certainly no legislative intent that, this series of statutes would be tenuously twisted together to make a corporation liable under Ga. Code Ann. § 27-2308(a). This point is made evident enough by

the fact that the Georgia Supreme Court itself rejected this very construction in its July 7, 1981 order.

Secondly, as Justice Smith stated in his dissent from the July 23, 1981 opinion:

> Even the legal fiction employed by the majority does not stand scrutiny. Under Code Ann. § 27-2502, the authority of the trial court to probate a sentence is discretionary. The fine authorized by Code Ann. § 27-2529 is also discretionary. Thus, the very existence of a sentence capable of being imposed against a corporation for violation of Code Ann. § 26-2308(a) will, in every case, depend upon a post facto exercise of discretion by the trial court. This hardly comports with my understanding of a sentence "prescribed" for an offense. See Johnson v. State, 169 Ga. 814, 817 (152 SE2d 76) (1929).

Certainly, a corporation, or any person, cannot constitutionally be subjected to such an indefinite and after-the-fact criminal prosecution.

CONCLUSION

The instant case presents a grave situation in which the highest court of a state has strained the construction of a number of state statutes in order to authorize politically popular prosecutions against corporations in an industry that has been the subject of a widely publicized investigation. Petitioner must seek refuge in this court for the protection of its constitutional rights to due process which have been trampled by the decision of the Georgia Supreme Court. If

allowed to stand, the judgment of the Georgia Supreme Court would permit laws which authorize arrest and prosecution with only a later determination of whether the conduct is to be considered subject to criminal sanctions. For the reasons set forth above, petitioner respectfully urges the Court to grant its petition for writ of certiorari.

Respectfully submitted,

RAY S. BOLZE
ROGER C. SIMMONS
RONALD K. PERKOWSKI

HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 383-6556

September 28, 1981

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing "Petition For A Writ of Certiorari To The Supreme Court of the State of Georgia" and the accompanying "Petitioner's Appendix to Petition For A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA" was made this 28th day of September, 1981, by mailing three copies thereof, first class mail postage prepaid, to counsel for the State of Georgia at the address below:

G. Thomas Davis
Special Assistant
Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

Roger C. Simmons

EXHIBIT A

PARENT:

Ashland Oil, Inc.

AFFILIATES:

Ashland-Otilum S.A. Industria Quimica

CARBOGAL-Carbonos de Portugal SARL

Iberia Ashland Chemical S.A.

Melamine Chemicals, Inc.

Minnesota Pipe Line Company

Parish Pipe Line Company

Arch Mineral Corporation

Australian Carbon Black Pty. Ltd.

Malaysian Carbon Sdn. Bhd.

Negrovan, S.A.

Ashland-Avebene

Ashland Chemical Italiana SpA.

Ashland de Mexico S.A. de C.V.

Ashland Resinas Sinteticas, Ltda.

Ashland-Suedchemie-Kernfest GmbH

Ashland-Suedchemie-Grembolith AG

Oleotecnica, S.A.

Crescent Petroleum Company

Ashland Exploration (U.K.) Ltd.

United Carbon India, Limited

EXHIBIT B

Clerk's Office, Supreme Court of Georgia

DEAR SIR: ATLANTA July 30, 1981

The motion for a rehearing was denied today:

Case No. 37421, 37422. Shepherd Const. Co. v. State,
37473. Ashland-Warren, Inc. v. State
Undercofler + Smith, JJ. dissent

Yours very truly,
MRS. JOLINE B. WILLIAMS, Clerk

Appendix

81-627

Office - Supreme Court
FILED
SEP 28 1981
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

ASHLAND-WARREN, INC.

Petitioner,

v.

STATE OF GEORGIA,

Respondents.

PETITIONER'S APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

RAY S. BOLZE
Counsel of Record
ROGER C. SIMMONS
RONALD K. PERKOWSKI
HOWREY & SIMON
1730 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Of Counsel:

HARRY DOWNS
ASHLAND-WARREN, INC.
Tower Place
3340 Peachtree Road, N.E.
Atlanta, Georgia 30326

Attorneys for Petitioner
ASHLAND-WARREN, INC.

TABLE OF CONTENTS

	Page
Opinion of the Supreme Court of Georgia dated July 7, 1981.....	1
Opinion of the Supreme Court of Georgia dated July 23, 1981 reversing opinion of July 7, 1981.....	22
Dissent of Smith, J. to July 23, 1981 Opinion.....	48
Order of the Superior Court of Fulton County, State of Georgia dated January 22, 1981 denying motion of defendants to quash the indictment as to the defendant Ashland-Warren, Inc.....	55

The Supreme Court of Georgia

Decided: July 7, 1981

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPPHERD CONSTRUCTION COMPANY, INC., et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

Jordan, Chief Justice.

The State of Georgia indicted the Shepherd Construction Company, Inc., Dan P. Shepherd and J. Harold Shepherd (hereinafter "The Shepherds") on seven counts of "conspiracy in restraint of free and open competition in transactions with the State" (Code Ann. § 26-2308(a)). The indictment charged the Shepherds with conspiring with certain others either to prohibit said others from submitting various road project bids lower than the

Shepherds' bids or to prohibit the Shepherd Construction Company, Inc. from submitting various road project bids lower than the others' bids. The Shepherds filed a series of pretrial motions. After holding a hearing, the trial court granted two of the Shepherd's motions and denied the remainder. The State appeals the two motions which the trial court granted and the Shepherds appeal the remaining motions which the trial court denied.

The State indicted Ashland-Warren, Inc. (hereinafter Ashland) and two of its officers on four counts of violating Code Ann. § 26-2308(a). Ashland moved to dismiss the indictment as to itself on the ground that a corporation could

not be charged under § 26-2308(a) because the statute provides only punishment by imprisonment. The trial court denied said motion and Ashland appealed to the Court of Appeals. On the motion of Ashland, this Court ordered the appeal transferred to this Court as a companion to the Shepherd appeal because one of the motions denied by the Shepherd trial court had raised the same issue as the Ashland motion.

I. (a) The State argues that the trial court erred in holding that Code Ann. § 26-2308(a) was unconstitutional because overbroad and facially vague. We agree.

Code Ann. § 26-2308(a) provides that "a person who enters into a

contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the state or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one nor more than five years. . . ."

As defined by the common law, the phrase "restraint of trade" means restraint of competition, Griffin v. Vandegriff, 205 Ga. 288, 293 (53 SE2d 345) (1949); State v. Central of Georgia Railway Company, 109 Ga. 716 (35 SE 37) (1889); Standard Oil Company of New Jersey v. U. S., 221 U. S. 1, 39, 55, 57, 59-61 (1910), and, the prohibition

against "a conspiracy in restraint of trade or in restraint of free and open competition" means simply a prohibition against a conspiracy in unreasonable restraint of competition. State of Georgia v. Central of Georgia Railway Company, 109 Ga. at 725; National Society of Professional Engineers v. U. S., 435 U. S. 679, 687-90 (1977); Northern Pacific Railway Co. v. U. S., 356 U. S. 1, 4, 5 (1957); Appalachian Coals, Inc. v. U. S., 288 U. S. 344, 359-60 (1932).

A statute is overbroad only if said statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that

in ordinary circumstances constitute an exercise of freedom of speech of the press." Thornhill v. Alabama, 310 U. S. 88, 97 (1939).

The first amendment does not protect speech which is "used in such circumstances and [is] of such a nature as to create a clear and present danger that it will bring about the substantive evils that [the state] has a right to prevent." Schenck v. U. S., 249 U.S. 49, 52 (1918).

In the present case, Code Ann. § 26-2308(a) bans only that speech by which individuals conspire to create an unreasonable restraint against competition--that is, only that speech which constitutes a clear and present danger of a

substantive evil which the state may avoid.

Code Ann. § 26-2308(a) is not unconstitutional because overbroad.

A criminal statute is unconstitutionally vague if (1) the statute failed to give full notice to the defendant that his conduct was forbidden, see Smith v. Goguen, 415 U. S. 566, 577-78 (1973); (2) the statute failed to give fair notice to anyone (including the defendant) that his conduct was forbidden, see Smith v. Goguen, at 572, 578; or (3) the statute (although it does give fair notice to the defendant) failed to give fair notice to someone else that his conduct was forbidden. See Young v. American Mini Theaters, 427 U. S. 50, 58-61 (1975).

A defendant has standing to challenge a statute for failure to give fair notice to someone else only if (1) the conduct for which the someone else could be prosecuted under the challenged statute is expression protected by the First Amendment and (2) the statute's deterrent effect against the other person's performing his protected expressive conduct is both real and substantial. Young v. American Mini Theaters, 427 U.S. at 59-60. Contra Parker v. Levy, 417 U.S. 733, 756-7 (1973).

We find that the deterrent effect of Code Ann. § 26-2308(a) against someone else's performing his protected expressive conduct is neither real nor substantial.

See Bates v. State Bar of Arizona, 433 U.S. 377, 379-81 (1977).

Accordingly, we hold that the Shepherds are without standing to challenge Code Ann. § 26-2308(a) for failure to give fair notice to third parties.

The common law definition of the prohibition contained in Code Ann. § 26-2308(a) (unreasonable restraint of competition) gave the Shepherds more than fair notice that their conduct was prohibited by said statute. U.S. v. U.S. Gypsum Company, 438 U.S. 422, 438-40 (1977); U.S. v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1105 (1979).

Accordingly, we hold that Code Ann. § 26-2308(a) is not

unconstitutionally vague as applied to the Shepherds (and, a fortiori, we also hold that said Code Section is not unconstitutionally vague as applied to everybody).

(b) The State argues that the trial court erred in granting the Shepherds' special demurrer to Counts 2 thru 7 of the indictment. Said Counts charged the Shepherds with conspiring with named individuals "and others" or "and another" to restrain free and open competition in transactions with state.

An accused is entitled to an indictment perfect in form as well as substance if he raises the question on special demurrer. See, State v. Eubanks, 239 Ga. 483 (238

SE2d 38) (1977). The "perfect" indictment must either name the alleged "other" conspirators or label them as unknown or unindicted. See Martin v. State, 115 Ga. 255, 256-7 (41 SE 576) (1902) (Dictum); U.S. v. Briggs, 514 F.2d 794 (1975). See generally Thompson v. Macon-Bibb County Hospital Authority, 246 Ga. 777 (273 SE2d 19) (1980).

In the present case, however, the names of the "other" conspirators had been given to the Shepherds by the state in the state's written response to the Shepherds' Brady motion.

For this reason, we hold that the trial court erred in granting the Shepherds' special demurrer to Counts 2 through 7 of the

indictment. See, U.S. v. Briggs, 514 F.2d at 800, 805.

II. (a) The Shepherds enumerate as error the trial court's denial of their motion to dismiss Count I of the indictment as barred by the four-year period of limitations in Code Ann. § 26-502(c). The trial court noted the State's allegation in Count I that the offense was unknown until October 20, 1980, and, held that, under Code Ann. § 27-601(4), said allegation stated a legally sufficient ground for tolling the otherwise expired four-year period of limitation in Code Ann. § 26-502(c).

The Shepherds note, however, that, under Code Ann. § 26-503(b),

the state's allegation does not state a legally sufficient ground for tolling the otherwise expired four-year period of limitations, and, argue that Code Ann. § 26-503(b) impliedly repealed that part of Code Ann. § 27-601(4) which provides that the period of limitation shall not run so long as the offense is unknown.

Code Ann. § 26-502, 503, and 504, effective July 1, 1969, track the provisions of Code Ann. § 27-601 (Cobb, 838, 842). Code Ann. § 26-503, however, in tracking that part of Code Ann. § 27-601 which provides that "[No] limitation shall run so long as the offender or offense is unknown," states only that no limitation shall run so

long as "the person committing the crime or crimes is unknown . . . ."

Accordingly, we hold that Code Ann. § 26-503 impliedly repealed that part of Code Ann. § 27-601 which provides that no limitation shall run so long as the offense is unknown, and, that the trial court erred in denying the Shepherds' motion to dismiss Count I of the indictment. See, Ezzard v. State, 229 Ga. 465, 467-68 (192 SE2d 374) (1972).

(b) The Shepherd Construction Co., Inc. and Ashland-Warren, Inc. argue that their respective trial courts erred in holding that a corporation could be indicted under Code Ann. § 26-2308(a). We agree and reverse.

"The power to create crimes and to prescribe punishment therefor is legislative," Johnson v. State, 169 Ga. 814, 817 (152 SE2d 76) (1929), and "criminal statutes must be strictly construed against the State . . . ." Knight v. State, 243 Ga. 770, 775 (257 SE2d 182) (1979).

Code Ann. § 26-2308(a) provides that a person who enters into a conspiracy in restraint of free and open competition in any transactions with the state "shall, upon conviction, be punished by imprisonment for not less than one nor more than five years."

A corporation cannot be indicted under a criminal statute which

provides only corporal punishment (death or imprisonment). See, Southern Railway Co. v. State, 125 Ga. 287, 289 (54 SE 160) (1906); State v. Willard, 54 So2d 183, 185 (1951).

Accordingly, we hold that a corporation cannot be indicted under Code Ann. § 26-2308(a). See Hill v. State, 53 Ga. 125 (1874).

The State argues, however, that, when construed with Code Ann. § 27-2529, Code Ann. § 26-2308(a) provides, as lawful sentences, both imprisonment and a fine, and, that, therefore, corporations can be indicted under the latter statute.

Construing Code Ann. § 27-2529 with Code Ann. § 27-2502, the former

statute authorizes a fine, not as a lawful sentence for a violation of Code Ann. § 26-2308(a), but as a condition precedent to a stay of execution of the only lawful sentence provided for in Code Ann. § 26-2308(a) - imprisonment.

(c) The Shepherds filed a motion for discovery praying for an order compelling the State to disclose Brady materials. Following a hearing, the trial court denied said motion. The Shepherds complain that the trial court erred in not conducting an in-camera inspection of the State's file and in not sealing the materials so inspected.

The Shepherds did not make a motion either for an in-camera inspection or to have the materials so inspected sealed. The present

enumeration of error is therefore without merit. See Hamby v. State, 243 Ga. 339, 341 (253 SE2d 759) (1979); McGuire v. State, 238 Ga. 247, 248 (232 SE2d 243) (1977).

(d) Having reviewed the Shepherds' remaining enumerations of error and the record relevant thereto, we hold that each of the remaining enumerations of error is without merit.

Judgment in 37387 reversed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division I(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37421 and 37422 affirmed in part and reversed in

part. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Divisions II(a) and (b) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37473 reversed. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Division II(b) and the judgment of reversal. Marshall, J., not participating.

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC., et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

UNDERCOFLER, Justice, dissenting to division 1 (a) and the judgment in Case No. 37387.

I must agree with the trial judge that Code Ann. § 26-2308 (a) is unconstitutional because facially vague. It makes criminal the restraint of free and open competition in a transaction with the State. However, restraint of free and open competition is not defined and it is not the judiciary prerogative to define it and thereby establish a crime. This is a legislative function and responsibility. Some respectable authority even whether the phrase

is capable of definition. Thus, persons must guess whether their business practices involve them in a transaction with the State and whether these practices are legitimate or criminal. Our constitution demands an identifiable offense before a person can be convicted and incarcerated. The statute fails to meet that standard.

In The Supreme Court of Georgia

Decided: July 7, 1981
July 23, 1981

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC., et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC. et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

Jordan, Chief Justice.

The State of Georgia indicted the Shepherd Construction Company, Inc., Dan P. Shepherd and J. Harold Shepherd (hereinafter "The Shepherds") on seven counts of "conspiracy in restraint of free and open competition in transactions with the State" (Code Ann. § 26-2308(a)). The indictment charged the Shepherds with conspiring with certain others either to prohibit said others from submitting various road project bids lower than the

Shepherds' bids or to prohibit the Shepherd Construction Company, Inc. from submitting various road projects bids lower than the others' bids. The Shepherds filed a series of pretrial motions. After holding a hearing, the trial court granted two of the Shepherd's motions and denied the remainder. The State appeals the two motions which the trial court granted and the Shepherds appeal the remaining motions which the trial court denied.

The State indicted Ashland-Warren, Inc. (hereinafter Ashland) and two of its officers on four counts of violating Code Ann. § 26-2308(a). Ashland moved to dismiss the indictment as to itself on the ground that a corporation could

not be charged under § 26-2308(a) because the statute provides only punishment by imprisonment. The trial court denied said motion and Ashland appealed to the Court of Appeals. On the motion of Ashland, this Court ordered the appeal transferred to this Court as a companion to the Shepherd appeal because one of the motions denied by the Shepherd trial court had raised the same issue as the Ashland motion.

I. (a) The State argues that the trial court erred in holding that Code Ann. § 26-2308(a) was unconstitutional because overbroad and facially vague. We agree.

Code Ann. § 26-2308(a) provides that "a person who enters into a

contract, combination, or conspiracy in restraint of trade or in restraint of free and open competition in any transaction with the state or any agency thereof, whether said transaction be for goods, materials, or services, shall, upon conviction, be punished by imprisonment for not less than one or more than five years. . . ."

As defined by the common law, the phrase "restraint of trade" means restraint of competition, Griffin v. Vandegriff, 205 Ga. 288, 293 (53 SE2d 345) (1949); State v. Central of Georgia Railway Company, 109 Ga. 716 (35 SE 37) (1889); Standard Oil Company of New Jersey v. U.S., 221 U.S. 1, 39, 55, 57, 59-61 (1910), and, the prohibition

against "a conspiracy in restraint of trade or in restraint of free and open competition" means simply a prohibition against a conspiracy in unreasonable restraint of competition.

State of Georgia v. Central of Georgia Railway Company, 109 Ga. at 725; National Society of Professional Engineers v. U. S., 435 U.S. 679, 687-90 (1977); Northern Pacific Railway Co. v. U.S., 356 U.S. 1, 4, 5 (1957); Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 359-60 (1932).

A statute is overbroad only if said statute "does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within

its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

Thornhill v. Alabama 310 U.S. 88, 97 (1939).

The first amendment does not protect speech which is "used in such circumstances and [is] of such a nature as to create a clear and present danger that it will bring about the substantive evils that [the state] has a right to prevent." Schenck v. U.S., 249 U.S. 49, 52 (1918).

In the present case, Code Ann. § 26-2308(a) bans only that speech by which individuals conspire to create an unreasonable restraint

against competition-that is, only that speech which constitutes a clear and present danger of a substantive evil which the state may avoid.

Code Ann. § 26-2308(a) is not unconstitutional because overbroad.

A criminal statute is unconstitutionally vague if (1) the statute failed to give full notice to the defendant that his conduct was forbidden, see Smith v. Goguen, 415 U.S. 566, 577-78 (1973); (2) the statute failed to give fair notice to anyone (including the defendant) that his conduct was forbidden, see, Smith v. Goguen, at 572, 578; or (3) the statute (although it does give fair notice to the defendant) failed to give

fair notice to someone else that his conduct was forbidden. See Young v. American Mini Theaters, 427 U.S. 50, 58-61 (1975).

A defendant has standing to challenge a statute for failure to give fair notice to someone else if (1) the conduct for which the someone else could be prosecuted under the challenged statute is expression protected by the First Amendment and (2) the statute's deterrent effect against the other person's performing his protected expressive conduct is both real and substantial. Young v. American Mini Theaters, 427 U.S. at 59-60. Contra Parker v. Levy, 417 U.S. 733, 756-7 (1973).

We find that the deterrent effect of Code Ann. § 26-2308(a)

against someone else's performing his protected expressive conduct is neither real nor substantial. See Bates v. State Bar of Arizona, 433 U. S. 377, 379-81 (1977).

Accordingly, we hold that the Shepherds are without standing to challenge Code Ann. § 26-2308(a) for failure to give fair notice to third parties.

The common law definition of the prohibition contained in Code Ann. § 26-2308(a) (unreasonable restraint of competition) gave the Shepherds more than fair notice that their conduct was prohibited by said statute. U. S. v. U. S. Gypsum Company, 438 U. S. 422, 438-40 (1977); U. S. v. Brighton Building & Maintenance Co., 598 F.2d 1101, 1105 (1979).

Accordingly, we hold that Code Ann. § 26-2308(a) is not unconstitutionally vague as applied to the Shepherds (and, a fortiori, we also hold that said Code Section is not unconstitutionally vauge as applied to everybody).

(b) The State argues that the trial court erred in granting the Shepherds' special demurrer to Counts 2 thru 7 of the indictment. Said Counts charged the Shepherds with conspiring with named individuals "and others" or "and another" to restrain free and open competition in transactions with state.

An accused is entitled to an indictment perfect in form as well as substance if he raises the

question on special demurrer. See, State v. Eubanks, 239 Ga. 483 (238 SE2d 38) (1977). The "perfect" indictment must either name the alleged "other" conspirators or label them as unknown or unindicted. See Martin v. State, 115 Ga. 255, 256-7 (41 SE 576) (1902) (Dictum); U. S. v. Briggs, 514 F.2d 794 (1975). See generally Thompson v. Macon-Bibb County Hospital Authority, 246 Ga. 777 (273 SE2d 19) (1980).

In the present case, however, the names of the "other" conspirators had been given to the Shepherds by the state in the state's written response to the Shepherds' Brady motion.

For this reason, we hold that the trial court erred in granting the Shepherds' special demurrer to Counts 2 through 7 of the indictment. See, U. S. v. Briggs, 514 F.2d at 800, 805.

II. (a) The Shepherds enumerate as error the trial court's denial of their motion to dismiss Count I of the indictment as barred by the four-year period of limitations in Code Ann. § 26-502(c). The trial court noted the State's allegation in Count I that the offense was unknown until October 20, 1980, and, held that, under Code Ann. § 27-601(4), said allegation stated a legally sufficient ground for tolling the otherwise expired four-year period

of limitation in Code Ann. § 26-502(c).

The Shepherds note, however, that, under Code Ann. § 26-503(b), the state's allegation does not state a legally sufficient ground for tolling the otherwise expired four-year period of limitations, and, argue that Code Ann. § 26-503(b) impliedly repealed that part of Code Ann. § 27-601(4) which provides that the period of limitation shall not run so long as the offense is unknown.

Code Ann. § 26-502, 503, and 504, effective July 1, 1969, track the provisions of Code Ann. § 27-601 (Cobb, 838, 842). Code Ann. § 26-503, however, in tracking that part of Code Ann. § 27-601 which

provides that "[No] limitation shall run so long as the offender or offense is unknown," states only that no limitation shall run so long as "the person comitting the crime or crimes is unknwon. . . ."

Accordingly, we hold that Code Ann. § 26-503 impliedly repealed that part of Code Ann. § 27-601 which provides that no limitation shall run so long as the offense is unknown, and that the trial court erred in denying the Shepherds' motions to dismiss Count I of the indictment. See Essard v. State, 229 Ga. 465, 467-68 (192 SE2d 374) (1972).

(b) The Shepherd Construction Co., Inc. and Ashland-Warren, Inc. argue that their respective trial

courts erred in holding that a corporation could be indicted under Code Ann. § 26-2308(a).

Code Ann. § 26-2308(a) provides that a person who enters into a cosnpiracy in restraint of free and open competition in any transctions with the state "shall, upon conviction, be punished by imprisonment for not less than one nor more than five years."

Section 26-401(1) of the 1968 Criminal Code [of which § 26-2308(a) is a part] defines the word "person" to include a "corporation", and § 26-803(a) of that Code provides: "A corporation may be prosecuted for the act or omission constituting a crime if, but only if: . . . The commission of the crime is

authorized, requested, commanded performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment in behalf of the corporation." Thus the General Assembly cleary provided that the 1968 Criminal Code would apply to corporations as prescribed in § 26-803. If the General Assembly had intended that corporations be criminally responsible only for those crimes on which fines were authorized, it certainly could have said so. It didn't. On the contrary, the General Assembly provided that corporations could be prosecuted for crimes authorized or performed by the board of directions or a managerial official acting within

the scope of his employment in behalf of the corporation.

In order to carry out the clear legislative intent that a corporation be held responsible for its crimes we must look to other provisions of law enacted by the General Assembly. Code Ann. §§ 27-2502 and 27-2529 (as amended), when read together, provide that the judge fixing sentence shall prescribe a determinate sentence for a specific number of years within the limits set by law, may probate a noncapital felony sentence upon such terms as he deems proper, and may impose a fine upon the convicted party not to exceed $10,000 (or the fine fixed by law, whichever is greater). As was said in Southern Railway

Co. v. State, 125 Ga. 287, 289 (54 SE 160) (1906). "While a corporation may not be imprisoned, it may be fined, and the fine enforced by levy on its property."

The defendants argue that probation is an act of leniency, and that under our law probation and payment of a fine cannot be imposed unless a sentence of confinement can first be imposed and then suspended. This technical argument leads to "corporate immunity" for serious crimes and "corporate accountability" for less serious crimes (those for which fines can be imposed; e.g., misdemeanors, where the fine shall not exceed $1000, Code Ann. § 27-2506). Unlike the defendants, we

do not consider a $10,000 fine to be an act of leniency. Moreover, it is illogical to assume that the General Assembly intended for corporations to be held responsible for minor crimes but not responsible for major ones.

In order to effectuate the clear intent of the General Assembly, we find that pursuant to Code § 26-803(a) a corporation can be prosecuted for violating the law, and that a court may sentence a corporation to serve a term for years (even though such sentence be incapable of enforcement) and may suspend that sentence and impose a fine. Code Ann. §§ 27-2502 and 27-2529.

(c) The Shepherds filed a motion for discovery praying for an order compelling the State to disclose Brady materials. Following a hearing, the trial court denied said motion. The Shepherds complain that the trial court erred in not conducting an in-camera inspection of the State's file and in not sealing the materials so inspected.

The Shepherds did not make a motion either for an in-camera inspection or to have the materials so inspected sealed. The present enumeration of error is therefore without merit. See Hamby v. State, 243 Ga. 339, 341 (253 SE2d 759) (1979); McGuire v. State, 238 Ga. 247, 248 (232 SE2d 243) (1977).

(d) Having reviewed the Shepherds' remaining enumerations of error and the record relevant thereto, we hold that each of the remaining enumerations of error is without merit.

Judgment in 37387 reversed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division I(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37421 and 37422 affirmed in part and reversed in part. All the Justices concur, except Hill, P.J., and Gregory, J., who dissent to Division II(a) and the judgment of reversal. Marshall, J., not participating.

Judgment in 37473 affirmed. All the Justices concur, except Undercofler and Smith, JJ., who dissent to Division II(b) and the judgment of affirmance. Marshall, J., not participating.

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC., et al.
37421, 37422 SHEPHERD CONSTRUCTION COMPANY, INC., et al. v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

UNDERCOFLER, Justice, dissenting to division 1 (a) and the judgment in Case No. 37387.

I must agree with the trial judge that Code Ann. § 26-2308(a) is unconstitutional because facially vague. It makes criminal the restraint of free and open competition in a transaction with the State. However, restraint of free and open competition is not defined and it is not the judiciary's prerogative to define it and thereby establish a crime. This is a legislative function and responsibility. Some respectable authority even questions whether

the phrase is capable of definition. Thus, persons must guess whether their business practices involve them in a transaction with the State and whether these practices were legitimate or criminal. Our constitution demands an identifiable offense before a person can be convicted and incarcerated. The statute fails to meet that standard.

I am authorized to state that Mr. Justice Smith joins in this dissent.

In The Supreme Court of Georgia

37387. STATE v. SHEPHERD CONSTRUCTION COMPANY, INC., et al.
37421. SHEPHERD CONSTRUCTION COMPANY, INC., et al v. STATE.
37422. SHEPHERD CONSTRUCTION COMPANY, INC., et al v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

GREGORY, Justice, dissenting.

I respectfully dissent to Division II(a) of the majority opinion.

As to Division II(a), the majority opinion holds the State's allegation that the offense was unknown until October 20, 1980 is insufficent to toll the running of the statute of limitations. My view is that the tolling statute includes that period of time when the offense is unknown. The statute provides for tolling of the period

of time in which "the person committing the crime or crimes is unknown . . ." Code Ann. § 26-503(b).

If the crime is unknown the person committing the crime must necessarily be unknown. It is not the knowledge of a person as an individual but the knowleged of a person as the offender which relates in a rational way to the tolling of the statute.

I am authorized to state that Presiding Justice Hill joins in this dissent as to Division II(a).

37387. STATE v. SHEPHERED CONSTRUCTION COMPANY, INC. et al.
37421, 37422. SHEPHERD CONSTRUCTION COMPANY, INC. et al v. STATE.
37473. ASHLAND-WARREN, INC. v. STATE.

SMITH, Justice, dissenting to Division II(b).

I, too, believe that corporations should be accountable under a criminal bid-rigging statute. However, the determination that corporations are to be held accountable is for the legislature. The majority's holding that the legislature has made such a determination can only be described as legal fantasy.

Code Ann. § 26-2308(a) provides only for corporal punishment--"imprisonment for not less than

one or more than five years." "[I]t is . . . well settled that where the only penalty provided for a criminal offense is a corporal punishment, that is where an offender can be punished only by death or imprisonment, a corporate defendant is not liable to criminal prosecution. This result proceeds from the impossibility of subjecting the artificial person of a corporation to a corporal penalty." Annot., Corporations Liability to Criminal Prosecution as Affected by Punishment or Penalty Imposed, 80 A.L.R.3d 1220, 1222 (1977); Southern Railway Co. v. State, 125 Ga. 287 (54 SE 160) (1906); State ex rel. Losey v. Willard, 54 So 2d

183 (Fla. 1951); People v. Duncan, 363 Ill. 495, 2 N.E.2d 705 (1936); State ex rel. Kropf v. Gilbert. 213 Wis. 196, 251 N.W. 478 (1933). Presumably our legislature was cognizant of an almost universally recognized legal principle when it enacted Code Ann. § 26-2308. See Brookins v. State, 221 Ga. 181, 190 (144 SE2d 83) (1965).

I find it inconceivable that Code Ann. §§ 27-2502 and 27-2509 were intended to provide the basic sentence for violation of the bid-rigging statute. "The manifest purpose of Code Ann. § 27-2502 is merely to enforce those other provisions which fix the punishment for an offense . . ." Lackey v.

State, 116 Ga. App. 789, 790 (159 SE2d 188)(1967). Code Ann. § 27-2529 simply authorizes the imposition of a fine where the basic sentence has been probated. It is obvious that, under this statutory scheme, a basic sentence, capable of being imposed and probated, must exist apart from the fine. However, the only lawful sentence provided in Code Ann. § 26-2308 is imprisonment, and, as the majority recognizes, such a sentence cannot be imposed on a corporation. Southern Railway Co. v. State, supra. The majority's resort to legal fiction (i.e. probation of a sentence which cannot be imposed, followed by imposition of a fine incident to the probation)

in order to reach a particular result seriously undermines the previously unassailable rule that "criminal statutes must be strictly construed against the state." Knight v. The State, 243 Ga. 770, 775 (257 SE2d 182 (1975).).[1]

---

[1] Even the legal fiction employed by the majority does not stand scrutiny. Under Code Ann. § 27-2502, the authority of the trial court to probate a sentence is discretionary. The fine authorized by Code Ann. § 27-2529 is also discretionary. Thus, the very existence of a sentence is capable of being imposed against a corporation for violation of Code Ann. § 26-2308(a) will, in every case, depend upon a post facto exercise of discretion by the trial court. This hardly comports with my understanding of a sentence "prescribed" for an offense. See Johnson v. State, 169 Ga. 814, 817 (152 SE2d 76) (1929).

Although the plain language of the two statutes should be dispositive of the "issue" (Hill v. State, 53 Ga. 125, 127 (1874); Balkcom v. Heptinstall, 152 Ga. App. 539 (263 SE2d 275) (1979)), it must also be noted that there is absolutely nothing in the legislative history of Code Ann. §§ 27-2502 and 27-2529 to support the majority's conclusion that these provisions were intended to provide the basic sentence for violation of the bid-rigging statute. The two sections were enacted during different legislative sessions than Code Ann. [3] 26-2803, and the statements of purpose preceding the enactments make no reference to it.

Manifestly, the majority has chosen to ignore a number of established legal principles in Division II(b) of its opinion. I must respectfully dissent.

ORDER

The defendants assert that a corporation cannot be charged with a violation of Ga. Laws 1968, pp. 1249, 1308 (Ga. Code Ann. 26-2308(a)).

This Court recognizes the well known maxim, "where the crime is, there the punishment should be also" (nulla poena sine lege), and the uniform rule of strict construction that does not permit the expansion of a criminal statute by implication. It is not for trial judges to tamper with criminal statutes by ignoring their obvious provisions nor by seeking to fill their egregious omissions. It is, however, our duty to rule in accordance with constitutional principles and to

see that the reasonable intention of the Legislature is effectuated.

The matter here seems to be one not yet passed upon in this State. The statutes to be considered are of recent origin. Ga. Code Ann. 26-2308 sets forth conduct which if committed would be a felony. Obviously the intention of the Legislature was to punish those "persons" who violated the statute. In that statute it is clear there exists no punishment which may be meted out to an artificial person. However, there is yet another criminal statute to be considered, to wit, Ga. Laws 1979, p. 848 (Ga. Code Ann. 27-2529).

The issue is clearly drawn. It is an established general

proposition of law, accepted by the parties hereto, that a corporation may be tried under a statutory scheme which allows for either fine or imprisonment as alternative provisions, but that it may not be tried under a statutory scheme which provides only for a sentence of imprisonment. The crucial question here is whether the statute invoked in this case, considering all relevant provisions of Georgia Law, falls into the former class of cases or the latter.

The Court is constrained to hold that it is in the former. The motion to quash the indictment as to the corporate defendant must fail.

Ga. Code Ann. 26-2308(a) is classified as a felony under Ga.

Code Ann. 26-401(e). As a felony which may be punished by imprisonment, thereby permitting the Court to employ the technique of a probated sentence, it may also impose punishment in the nature of a fine not to exceed $10,000 under Ga. Code Ann. 27-2529. Further, under Ga. Code Ann. 27-1001 such fine may be enforced not only by revocation (which concedely could not affect an artificial person insofar as physical incarceration is concerned), but also through means provided for collection of money judgments.

As the entire statutory scheme allows imposition of a fine in lieu of imprisonment, no bar exists against trying the corporate

defendant. Overland Cotton Mills Co. v. People 75 P. 924 (1904); People v. Charter Thrift and Loan 30 Cal. App. 3d 412, 106 Cal. Rptr. 364 (1973); Southern Ry. v. State, 125 Ga. 287, 54 S.E. 160 (1906).

The natural inference which arises in considering the statutes herein cited is that where a sanction does exist which can be applied to the artificial person, it should be applied. Otherwise, the guilty party albeit an artificial person, would be permitted to escape and the intention of the legislation would be frustrated. In applying the sanction for commission of a felony in Ga. Code Ann. 27-2529 the statutory scheme is permitted to be implemented so that, insofar

as possible, the purpose of the legislation can be attained. The generally accepted rule that the provisions of the penal code are to be construed in accordance with the view of effecting its purposes, therefore, is met in permitting the trial to proceed against the corporate defendant.

The Court finds that because of the statutory scheme set forth in Titles 26 and 27 of the Criminal Code, the defendant had ample notice of the criminal offense alleged to have been committed. There is a sufficient degree of specificity regarding potential sanctions to be imposed in the event of a finding of guilty to protect it from any arbitrary infliction of punishment.

IT IS THEREFORE ORDERED that the motion of the defendants to quash the indictment as to the defendant Ashland-Warren, Inc. is denied.

This 22nd day of January 1981

Jack P. Etheridge
Senior Judge,
Atlanta Judicial Circuit

Opposition

Office - Supreme Court, U.S.
FILED
OCT 27 1981
ALEXANDER L. STEVAS
CLERK

NO. 81-627

IN THE

Supreme Court of the United States

October Term, 1981

ASHLAND-WARREN, INC.
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

BRIEF FOR THE STATE OF GEORGIA IN OPPOSITION TO THE PETITION FOR CERTIORARI

132 State Judicial Bldg.
Atlanta, Georgia 30334

2000 Cain Tower
229 Peachtree Street
Atlanta, Georgia 30303
404/588-0505

MICHAEL J. BOWERS
Attorney General

G. THOMAS DAVIS
Special Assistant
Attorney General

MICHAEL E. SULLIVAN
Special Assistant
Attorney General

Question Presented

Whether a corporation is immune from criminal prosecution under Georgia Laws 1968, pp. 1249, 1308, Ga. Code §26-2308(a), because no fine is provided within the confines of that particular statute.

TABLE OF CONTENTS

Page

Jurisdiction 2

Statement 3

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Page

Cases:

Central and Hudson R. Co. v. United States, 212 U.S. 481 (1909) 7

People v. Charter Thrift and Loan, 30 Cal. App. 3rd 412, 106 Cal. Rep. 364, (1973) 9

Southern Ry. v. State, 125 Ga. 287 (1906) 7,8

Statutes:

Ga. Code §26-2308(a) .i,3,4,5,6,7

Ga. Code Ann. §27-2502 10

Ga. Code Ann. §27-2529 10

Ga. Code Ann. §102-103 7

28 U.S. §1257(3) 2

NO. 81-627

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1981

ASHLAND-WARREN, INC.

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

BRIEF FOR THE STATE OF GEORGIA IN OPPOSITION TO THE PETITION FOR CERTIORARI

OPINION BELOW

The opinion of the Supreme Court of Georgia (Pet. App. 22-54) is reported at 248 Ga. 1.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3).

STATEMENT

The Petitioner, Ashland-Warren, Inc., was indicted by the Grand Jury of Fulton County on November 21, 1980 for violation of Ga. Code. §26-2308(a) in four counts. Those counts, in essence, charged the corporation, along with two of its employees, with conspiring to rig bids on construction projects to be awarded by the Georgia Department of Transportation.

Subsequent to the return of the indictment, the corporate defendant filed, among other things, a plea and a motion to quash the indictment, both being based upon the corporation's contention that it could not be prosecuted under Ga. Code §26-2308(a). The trial court received briefs on the question presented and after hearing argument of counsel entered an

order denying the corporate defendant's plea and motion. The trial court found that it was clearly the intent of the General Assembly of Georgia to include corporations under the provisions of Ga. Code §26-2308(a). Indeed, there was no question on this point since the corporate defendant admitted in essence that such was the intent of the General Assembly. The trial court further found that from a view of the criminal statutory scheme, the corporate defendant could be prosecuted for the crime charged and if found guilty could be fined and appropriate conditions of probation imposed.

The thrust of the trial court's order was that it is the duty of the Courts to see that the reasonable intention of the Legislature is effectuated when that may be done through the criminal statutory scheme

present. The Supreme Court of Georgia, after finding it to be the clear intent of the General Assembly to include corporations within the strictures of Ga. Code §26-2308(a), concluded that the existing criminal statutory framework satisfied the requirement that a penalty applicable to this corporate defendant could be imposed by a trial court.

There is serious question as to whether the constitutional issue the petitioner seeks to present by its petition for certiorari was ever presented as such below. Below the petitioner chose to present the issue in terms of state law.

ARGUMENT

As its sole reason for granting a writ of certiorari, the corporate petitioner appears to argue that the criminal statute in question, Ga. Code §26-2308(a) gives no notice that it can be applied to a corporate defendant. That argument is based entirely upon the fact that the particular statute does not have within its provisions the alternative of a monetary fine.

It cannot be seriously argued that the General Assembly of Georgia intended to exempt corporations from the strictures of this statute. In fact, the corporate petitioner admitted in effect in the trial court that it probably was the intent of the General Assembly to include corporations within the strictures of Ga.

Code §26-2308(a). Corporations are uniquely in a position to violate the statute in question, since the great majority of business with the State is transacted by corporations and not by individual entrepreneurs.

Corporations have been accorded legal existence and rights and privileges as legal persons under the laws of this State. In construing statutes, the word "person" includes these fictional persons as well as natural persons absent an express intent to exclude them. See, Ga. Code Ann. §102-103. It has long been the law in Georgia and in the rest of the country that corporations are liable for violations of penal statutes. Southern Ry. v. State, 125 Ga. 287 (1906); Central and Hudson R. Co. v. United States, 212 U.S. 481 (1909).

The corporate petitioner erroneously states in its petition that the law in Georgia has been that when the only penalty provided for a criminal offense is corporal punishment, that is, where an offender can be punished only by death or imprisonment, a corporate defendant is not liable to a criminal prosecution. That is an incorrect statement of the law as it existed in this State. The case sub judice was a case of first impression in Georgia. An older case, Southern Ry. Co. v. State, supra, held that a sentence of imprisonment against a corporation was ineffective. Obviously, a corporation cannot be physically confined in a prison. This does not preclude criminal liability under the statute in question here and there was no authority directly in point on the issue before the Supreme Court of Georgia.

In determining this question, the Supreme Court of Georgia chose to follow the reasoning represented by cases such as People v. Charter Thrift & Loan, 30 Cal. App. 3rd 412,106 Cal. Rep. 364, 365-366 (1973). There the California court was faced with a prosecution of a corporation under a statute which provided a punishment by imprisonment only. That Court held that a fine could be imposed under a general statute which allowed such fine only in addition to imprisonment "whether or not, were the defendant an individual, an actual or potential term of imprisonment would be a prerequisite for the imposition of a fine". That Court looked at the intent of its legislature to punish a corporation violating the statute in question.

Likewise, the Georgia Supreme Court

chose to look at the entire criminal statutory scheme to see the method by which a corporate defendant could be punished under this statute if found guilty of the crime charged. To do that, it was necessary to construe probation statutes of the State, Ga. Code Ann. §27-2502 and §27-2529. Using those general statutes, a trial judge could impose a term of imprisonment, then probate that term and impose a fine of up to $10,000.00

Moreover, all of this is made necessary by the legal recognition of the fictional existence of corporations. If it were not for that fictional existence, there would be no problem in that a term of imprisonment could be imposed on persons in business who violated the law. To allow the clear intent of the General Assembly of Georgia to be frustrated by the highly technical argument made by the corporate

petitioner would grant to this fictional person all the rights and privileges granted to natural persons in this State without subjecting it to any of the consequences imposed upon natural persons for their actions. This would not be due to any difficulty of attribution of guilt to the corporate offender, but to an artificial theoretical difficulty with imposition of an appropriate punishment.

For the corporate petitioner to now say in effect that since there is no provision for a fine on the face of the particular statute it was led into believing that it could rig highway bids with total impunity is pure sophistry. Clearly, any individual agent acting on behalf of the corporation had notice, legally, that the bid rigging activities in

which they engaged on behalf of that corporation were illegal. It cannot be seriously argued that the corporation - chargeable with knowledge and acting in the only possible way such a fictional person is capable of acting, by and through the agency of human beings - did not "know" that it was rigging bids.

CONCLUSION

In conclusion it is respectfully requested that this Court deny the petition for certiorari filed by the corporate petitioner and allow this State to proceed with the prosecution of this corporate petitioner for rigging bids on State Highway Projects.

Respectfully submitted,

MICHAEL J. BOWERS
Attorney General

/s/
G. THOMAS DAVIS
Special Asst. Attorney General

/s/
MICHAEL E. SULLIVAN
Special Asst. Attorney General

OCTOBER, 1981

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served three true and correct copies of the foregoing Brief for the State of Georgia in Opposition to the Petition for Certioriari upon each of the attorneys of record for the opposing party at their addresses of record as follows:

Ray S. Bolze
Howry and Simon
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Harry Downs
Ashland-Warren, Inc.
Tower Place
3340 Peacthree Road, N.E.
Atlanta, Georgia 30326

by depositing said copies in the United States Mail with first class postage prepaid.

This 26 day of October, 1981

/s/
G. Thomas Davis
Special Assistant Attorney General